IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 4698 OF 2005

Shri Mahaveer Bahrmu Patil
& Ors. .. Petitioners.

vs.

Ichalkaranji Municipal Council. .. Respondents.

Mr. V.B. Rajure for Petitioners.
Mr. T.S. Ingale for Respondent.

..

Coram: J.N. PATEL, J.
Date: 26th July, 2006.

P.C.

. Heard.

2. The petitioner as the owner has filed a suit challenging the encroachment on the part of the respondent on his land in addition to the land acquired for constructing a stadium and also moved the Court for inter-locutary order against the respondent. The application for temporary injunction came to be rejected by the trial Court by its order dated 28.6.2005 which was carried in appeal. The appellate

Court confirmed the order of the trial Court and dismissed the appeal by its order dated 4.7.2005 which is the subject matter in this petition.

3. The learned counsel for the petitioner submitted that if the land is got measured that would resolve the controversy and it is submitted that for the present no construction has come up on the disputed land which is the subject matter of the suit and, therefore, the Court should at least consider the case of the petitioner for grant of an order of status-quo.

4. This Court finds that both, the trial Court as well as the lower appellate court have dismissed the application seeking temporary injunction filed by the petitioner-plaintiff by taking into consideration facts on record and after observing that as the land has been acquired and is being put to use for public purpose for which the petitioner has received compensation, granting of injunction will not be justifiable as the petitioner has not been able to meet the requisite of prima facie case, balance of convenience and irreparable loss.

5. This Court may add that in case it is found that the respondent Municipal Council has factually encroached upon the land which is more than the land acquired for the said purpose, the petitioner can be compensated and, therefore, no interference is called

for.

6. The learned counsel for the petitioner submits that if the Court directs the trial Court to appoint a Commissioner for carrying out measurement of the land, the dispute can be resolved. In so far as this contention is concerned, it will be open for the parties to move the trial Court in the matter seeking appointment of Commissioner and if such an application is made, the trial Court would take a decision in accordance with law by keeping in mind the principle that it is for the plaintiff to prove its case and it cannot take assistance of the Court by seeking appointment of the Commissioner to create evidence.

7. It will also be open for the plaintiff to get the land measured on his own accord from the City Survey Office at his own costs for which he need not move the Court which will be for his own good. With this observation, the petition is dismissed. No order as to costs.

(J.N. Patel,J.)